**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**FIRST APPEAL No. 4405 of 2006**
**With**
**CIVIL APPLICATION No. 12934 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE M.S.SHAH**
and
**HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**NEW INDIA ASSURANCE CO. LTD - Appellant(s)**
**Versus**
**RANBAI TULSI KOLI & 7 - Defendant(s)**

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**Appearance :**
MR HASMUKH THAKKER for Appellant(s) : 1,
MR SANDEEP N BHATT for Defendant(s) : 1,
None for Defendant(s) : 2 - 8.

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**CORAM : HONOURABLE MR.JUSTICE M.S.SHAH**

**and**

**HONOURABLE MR.JUSTICE AKIL KURESHI**

**Date : 15/11/2006**
**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE M.S.SHAH)**

In this appeal under Section 173 of the Motor Vehicles Act, 1988, the appellant- Insurance Company has challenged the judgment and award dated 19.1.2005 passed by the Motor Accident Claims Tribunal, Gandhidham-Kutch in application below Exh.13 in MAC Petition No.189 of 2002 awarding compensation of Rs.4,36,500/- to the widow and five minor children of Tulsi Koli who died in a motor vehicle accident on 8.6.2002.

2. Tulsi Rava Koli (hereinafter referred to as “the deceased”), aged about 35 years, was walking on the Gandhidham-Bhachau highway road on 8.6.2002 when the Pai Loader insured by the appellant-Insurance Company hit the deceased resulting into serious injuries to the deceased and ultimately the deceased succumbed to those injuries during the treatment. The widow and five minor children of the deceased filed the claim petition for compensation of Rs.4,36,500/- under Section 163A of the Act. The learned advocate for the appellant points out that the original application was filed under Section 166 of the Act and thereafter that application was withdrawn and the present application came to be filed under Section 163A of the Act.

3. After considering the documentary evidence on record, the Tribunal held that the deceased sustained injuries in a motor vehicle accident involving the vehicle in question insured by the

appellant-Insurance Company. The fact of involvement of the said vehicle in the accident, accidental injuries to the deceased and his resultant death - these facts were not challenged by the Insurance Company. All that the Insurance Company challenged was the age of the deceased and the income of the deceased.

Although no documentary evidence regarding income of the deceased was produced by the claimant, the deceased owned a three-wheeler motor-cycle rickshaw and was possessing driving licence for the same. In the said licence, the birth-date of the deceased was shown as 4.6.1968. The accident took place on 8.6.2002. Hence, the deceased had completed 34 years of age on the date of the accident. On the basis of the affidavit of the widow of the deceased, the Tribunal assessed the income of the deceased at Rs.3500/- per month and Rs.40,000/- per year. Looking to the age of the deceased (between 30 and 35 years) and the income of the deceased assessed at Rs.40,000/- per annum, the Tribunal worked out the compensation payable to the widow and minor children of the deceased (after deducting one-third of the amount which the deceased would have spent on himself had re remained alive) at Rs.4,27,000/-. Adding thereto the conventional amounts of Rs.2000/- for funeral expenses, Rs.2500/- for loss to the estate and Rs.5000/- for loss of consortium to the widow of the deceased, the Tribunal made a total award of Rs.4,36,500/-.

4. Mr Thakker, learned counsel for the appellant-Insurance Company has assailed the award only on the ground that since the income of the deceased was Rs.3500/- per month = Rs.42,000/- per annum, the claim petition under Section 163A of the Act was not at all maintainable. In support of the said contention, the learned counsel has placed strong reliance on the decision of the Apex Court in **Deepal Girishbhai Soni vs. United Insurance Co. Ltd. Baroda**, 2004 ACJ 934 = 2004 (5) SCC 385 = AIR 2004 SC 2107, particularly paragraphs 51, 53 and 67 thereof laying down that the proceeding under Section 163A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs.40,000/- can take the benefit thereof and that all other claims are required to be determined in terms of Chapter XII of the Act.

5. It is true that in Deepal Soni's case (supra), their Lordships of the three Judge Bench of the Apex Court did not agree with the findings in Kodala's case 2001 ACJ 27 that if a person invokes provisions of Section 163A, the annual income of Rs.40,000/- per annum shall be treated as a cap. In Deepal Soni's case it is held in terms that only those whose annual income is upto Rs.40,000/- can take the benefit of Section 163A of the Act and that all other claims are required to be determined in terms of Chapter XII of the Act i.e. by filing an application under Section 166 of the Act.

6. Be it noted that even as per the case of the appellant-Insurance Company, the widow and five minor children of the deceased had earlier filed the claim petition under Section 166 of the Act and it was thereafter that the permission was obtained for withdrawing that application and the present application came to be filed under Section 163A of the Act. That order of the Tribunal permitting withdrawal of the application under Section 166 of the Act with liberty to file another application under Section 163A of the Act was not challenged at the relevant time. The claimants thus walked out of the long queue under Section 166 of the Act in order to get expeditious justice and preferred to get fixed compensation under Section 163A of the Act. The law as it stood then permitted the claimants to move the Court for such withdrawal/conversion. The decision of the Apex Court in Kodala's case 2001 ACJ 27 was also followed by this Court in **NN Majirana vs. MA Bishnoi, 2004 (1) GLR 875** specifically observing that even where the claimant has in his application under Section 166 of the Act claimed compensation on “fault principle” on the basis of the income of the injured/deceased at more than Rs.40,000/- per annum, it is open to the claimant to claim structured formula compensation under Section 163-A of the Act by restricting his claim on the basis of income upto Rs.40,000/- p.a. or whatever may be the upper income limit in the Second Schedule as may be in force on the date of the accident.

Apart from the fact that the claim petition under Section 166 of the Act was thus permitted to be withdrawn (which permission was never challenged by the appellant-Insurance Company), and an application under Section 163A of the Act was filed on the basis of the law which was then prevailing, the fact also remains that the widow of the deceased had stated in her affidavit that the deceased was plying a three-wheeler motor-cycle rickshaw and was earning about Rs.3500/- per month. Multiplying the said amount by 12 months would make it Rs.42,000/-p.a.. On the other hand, on dividing the maximum limit of Rs.40,000/- by 12, the monthly income would come to Rs.3333/-. If the said amount of Rs.3333/- were to be rounded off, ordinarily it would be rounded off to Rs.3400/- or Rs.3500/-. So merely because the claimants did not make appropriate arithmetical rounding off or calculation, the claimants cannot now be non-suited merely on the ground that by a subsequent decision of the Apex Court rendered in the year 2004, the claim petition filed under Section 163A in the year 2002 would be non-maintainable.

7. Over and above the aforesaid factual aspect regarding income, we called upon the learned counsel for the appellant-Insurance Company to indicate whether the Insurance Company would be in a position to dispute the claimants' case that the accident was caused by rash and negligent driving of the loader by the loader driver who was joined as opponent No.1 in

the claim petition.

8. In the facts and circumstances of the case and considering the manner in which the accident took place, particularly the fact that the deceased was a pedestrian on the road and the loader knocked down the deceased, the learned counsel for the appellant-Insurance Company fairly submitted that it would not be possible to contend that the accident was not caused by rash and negligent driving of the loader involved in the accident. In this view of the matter, it would be an academic exercise to first dismiss the claim petition under Section 163A of the Act on the ground that the income of the deceased was Rs.42,000/- per annum and not Rs.40,000/- per annum and thereafter requiring the Tribunal to pass the said award under Section 166 of the Act. In fact, under Section 166 of the Act, the claimants may be able to get higher compensation amount as the conventional amounts for loss to the estate and for loss of consortium would be much higher than the amounts specified in the Second Schedule applicable to the claim proceedings under Section 163A of the Act.

9. For the reasons aforesaid, we do not find any reason to interfere with the award under challenge.

The appeal is, therefore, summarily dismissed.

The amount deposited before this Court at the time of filing the appeal shall be transmitted to the Tribunal within two weeks from today.

10. Since the appeal is dismissed, the civil application is also dismissed.

(M.S. SHAH, J.)

(AKIL KURESHI, J.)

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